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BIKRAM'S YOGA COLLEGE OF INDIA, L.P.
and BIKRAM CHOUDHURY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BIKRAM'S YOGA COLLEGE OF INDIA, L.P., a California limited partnership; BIKRAM CHOUDHURY, an individual,

Plaintiffs,

v.

EVOLATION YOGA, LLC, a New York limited liability company; MARK DROST, and individual; ZEFEA SAMSON, an individual; and DOES 1 through 10, inclusive,

Defendant.

AND RELATED COUNTERCLAIM

Case No. CV-11-05506-ODW (SSx)

Hon. Otis D. Wright, II
Courtroom 11

PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW

[Memorandum of Law in Support of Plaintiffs' Opposition to Defendants' Motion for Partial Summary Judgment Filed Concurrently]

Date: December 10, 2012
Time: 1:30 p.m.
Place: Courtroom 11 – Spring Street

Complaint filed: July 1, 2011
Trial Date: January 29, 2013

Plaintiffs and Counter-Defendants Bikram Choudhury and Bikram's Yoga College of India, L.P., submit the following in response to the Statement of Uncontroverted Facts and Conclusions of Law of Defendants and Counterclaimants Evolation Yoga LLC, Mark Drost and Zefea Samson.

UNCONTROVERTED FACTS

No.	**Moving Party's Alleged Uncontroverted Fact**	**Response And Evidence**
1	Bikram Choudhury developed a brand of yoga known as "Bikram's Basic Yoga System."	• Disputed in that the brand of yoga is referred known by a number of names including "Bikram Yoga", "Bikram Sequence", "Bikram's Beginning Yoga Class." • Complaint, ¶ 17; Choudhury Decl., ¶¶ 5-15, 28.
2	Bikram's Basic Yoga System is a series of 26 yoga positions and two breathing exercises (the "Sequence") performed in precisely the same sequence, for precisely 90 minutes in a room heated to 105 degrees Fahrenheit.	• Disputed. Complaint, ¶ 18; Choudury Decl., ¶¶ 5-15.
3	Bikram Choudhury does not claim to have created any of the 26 poses or any of the two breathing exercises that comprise the	• Disputed to the extent that Bikram modified certain postures in the Bikram

	Sequence.	Sequence. Choudhury Decl., ¶¶ 5-9
4	Mark Drost, Zefea Samson, and Evolation LLC offer a few different types of yoga classes, including classes that utilize the 26 poses and two breathing exercises that comprise the Sequence.	• Undisputed. • Hatton Decl., ¶¶ 11-16.
5	The U.S. Copyright Office has issued nine certificates of copyright registration for works authored, created, and/or attributed to Bikram Choudhoury.	• Undisputed
6	The U.S. Copyright Office issued Certificate of Copyright Registration No. TX-170-160 to Bikram Choudhoury in 1979 for a work of text entitled Bikram's Beginning Yoga Class	• Undisputed as relates to Registration No. TX 179-160. • Choudhury Decl., ¶¶ 28-30, Ex. H.
7	The U.S. Copyright Office issued Certificate of Copyright Registration No. TX-5-259-325 to Bikram Choudhoury in 2000 for a work of text entitled Bikram's Beginning Yoga Class (2nd Edition)	• Undisputed. • Choudhury Decl., ¶ 32, Ex. I.
8	The U.S. Copyright Office issued Certificate of Copyright Registration No. TX-5-624-003 to Bikram Choudhoury in 2002, which supplemented TX-170-160 for Bikram's Beginning Yoga Class	• Undisputed as relates to Registration No. TX 179-160 and TX 5-624-003. • Choudhury Decl., ¶¶ 28-30, 42-43, Exs. H, N.

9	The U.S. Copyright Office issued Certificate of Copyright Registration No. TX-5-499-662 to Bikram Choudhoury in 2002 for the sound cassette version of Bikram's Beginning Yoga Class	• Undisputed. • Choudhury Decl., ¶¶ 48-49, Ex. Q.
10	The U.S. Copyright Office issued Certificate of Copyright Registration No. TXu-1-022-657 to Bikram Choudhoury in 2002 for a work of text entitled Bikram's Yoga College of India Beginning Yoga Dialogue	• Undisputed. • Choudhury Decl., ¶¶ 45, 46.
11	The U.S. Copyright Office issued Certificate of Copyright Registration No. TXu-934-417 to Bikram Choudhoury in 2002 for a work of text entitled Bikram's Yoga College of India: Yoga Teacher Training Course: Curriculum Outline	• Undisputed. • Choudhury Decl., ¶ 47, Ex. P.
12	The U.S. Copyright Office issued Certificate of Copyright Registration No. PA-1-053-335 to Bikram Choudhoury in 2002 for a motion picture entitled Yoga For Pregnancy	• Undisputed. • Choudhury Decl., ¶ 52, Ex. U.
13	The U.S. Copyright Office issued Certificate of Copyright Registration No. TXu-1-323-218 to Bikram Choudhoury in 2006 for a work of text entitled Bikram's Advanced Yoga Class	• Undisputed. • Complaint, ¶ 33.
14	The U.S. Copyright Office issued Certificate of Copyright Registration No. TX-6-555-860 to Bikram Choudhoury in 2006 for a work of text entitled Bikram Yoga	• Undisputed. • Complaint, ¶ 33.

15	In 1979, Bikram Choudhury published a 211-page book entitled "Bikram's Beginning Yoga Class," which includes a description of the Sequence.	• Maier Decl., Exh. A at ¶ 31. • Undisputed. • Choudhury Decl., ¶ 28.
16	In 2000, Bikram Choudhury published a second edition of "Bikram's Beginning Yoga Class," which includes a description of the Sequence.	• Undisputed. • Choudhury Decl., ¶ 31.
17	In their complaint, the Bikram Parties refer to the Sequence as part of a system or method of yoga.	• Disputed.
18	According to Bikram Choudhury, the 26 postures that comprise the Sequence "systematically work every part of the body, to give all internal organs, all the veins, all the ligaments, and all the muscles everything they need to maintain optimum health and maximum function."	• Disputed.
19	In Bikram's Beginning Yoga Class, Bikram Choudhury asserts: "From the experience of teaching over a million and a half students, I can confidently say that my system of Hatha Yoga is capable of helping you avoid, correct, cure, heal, or at least alleviate the symptoms of almost any illness or injury."	• Undisputed.
20	In Bikram's Beginning Yoga Class, Bikram Choudhury asserts: "I researched the diseases	• Undisputed.

	and the postures and after many years of research and verification, having used the methods taught to me by my guru and using modern medical measurement techniques, I arrived at the sequence of postures you will find in this book."	
21	Bikram Choudhury claims that Bikram's Basic Yoga System is capable of helping to avoid, correct, cure, heal and alleviate the symptoms of a variety of diseases and health issues.	• Undisputed.
22	According to Bikram Choudhoury, the intended benefits of Bikram's Basic Yoga System can only be derived if the yoga class is performed precisely as Bikram Choudhury developed it.	• Undisputed.
23	Bikram Choudhury forbids music to be played during classes that practice Bikram's Basic Yoga System.	• Undisputed.
24	Registration Certificate TX-5-624-003 is a supplementary registration for Bikram's 1979 book entitled "Bikram's Beginning Yoga Class."	• Undisputed.
25	Bikram Choudhury attempted to register a copyright for "Bikram's Asana Sequence" as a work of the performing arts in 2002.	• Undisputed.
26	The U.S. Copyright Office did not issue a certificate of registration of a copyright for	• Disputed. • Choudhury Decl., ¶¶ 33-42,

	"Bikram's Asana Sequence" as a work of the performing arts.	Exs. J-N.

CONCLUSIONS OF LAW

1. The legal standard for summary judgment in a copyright case is no different than the standard applied in all other civil actions. *Shaw v. Lindheim*, 919 F.2d 1353, 1358-59 (9th Cir. 1990).
2. The standard for summary judgment in copyright actions "must comport with the standard applied to all civil actions." *Sinai v. Cal. Bureau of Automotive Repair*, 25 U.S.P.Q.2d (BNA) 1809, *4 (N.D. Cal. 1992).
3. To prevail on a motion for summary judgment, the moving party must establish that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (citing Fed. R. Civ. P. 56(c)).
4. If a defendant seeks summary judgment in connection with an affirmative defense to a claim or on a counterclaim on which they bear the burden of proof, their "showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for [defendants]." *Carnegie Melon Univ. v. Hoffman La Roche, Inc.*, 148 F.Supp.2d 1004, 1009 (N.D. Cal. 2001).
5. Summary judgment is not proper where there are "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).
6. Evidence presented must be viewed in the light most favorable to the non-moving party, and all justifiable inferences must be drawn in the non-moving party's favor. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 255 (1986).
7. Summary judgment is not proper if the moving party fails to establish that a particular claim cannot be sustained on any theory. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153-159 (1970) (summary judgment of claim improper if claim can be sustained on any theory).

8. Summary judgment is not proper if it does not dispose of an entire claim or defense. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).
9. Citation to the court's opinion in *U.S. v. Mohalla*, 545 F. Supp.2d 1035, 1039 (C.D. Cal. 2008), for the proposition that a court may grant summary judgment for "all or any part of a party's claim" is misleading. The term "claim" is not within the internal quote in the *U.S. v. Mohalla* opinion. Federal Rules of Civil Procedure, rule 56, requires that a motion dispose of an entire action, claim or defense.
10. Bikram's copyright registration in the Bikram Sequence enjoys a statutory presumption of validity. 17 U.S.C. § 410(c).
11. The presumption of validity attaches to works registered within five years of publication. *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1076 (9th Cir. 2000), *citing Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 201 (9th Cir. 1989) (registration of copyright creates a presumption of validity).
12. The 1979 edition of the book "Bikram's Beginning Yoga Class" (the "Book") was registered within two years of publication, evidenced by Certificate of Copyright Registration No. TX 179-160.
13. The "compilation of exercises" contained in the Bikram Sequence is specifically covered by Certificate of Copyright Registration No. TX 5-624-003. This registration is supplemental to Registration No. TX 179-160 for the Book.
14. Copyright Registration No. TX 5-624-003 for the Bikram Sequence enjoys the same statutory presumption of validity as Copyright Registration No. TX 179-160. 17 U.S.C. § 410(c).
15. The fixed media covered by Copyright Registration No. TX 5-499-662, No. TXu 1-022-657, No. TXu 934-417, No. PA 1-053-335, No. TXu 1-323-218 and No. TX 6-555-860 depict and describe the Bikram Sequence covered by the Book, therefore they enjoy the same statutory presumptions of validity as the Book. 17 U.S.C. § 410(c).

16.Defendants bear the burden of overcoming the presumption of validity and establishing that each of Bikram's copyright registrations is invalid to a summary judgment certainty. *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1075-76 (9th Cir. 2000).

17.Defendants cannot meet the burden of overcoming the presumption of validity by offering conclusory arguments in briefs or hearsay, contradictory pronouncements in policy statements. *321 Studios v. Metro-Goldwyn-Mayer Studios, Inc.*, 307 F. Supp. 2d 1085, 1090-91 (N.D. Cal. 2004).

18. The presumption of validity of a copyright registration may be rebutted only if it is demonstrated that the work is not original. *North Coast Industries v. Jason Maxwell, Inc.*, 972 F.2d 1031, 1033 (9th Cir. 1992).

19.Bikram's Asana Sequence is a collection and assembly of preexisting materials, selected, coordinated, and arranged in such a way that the resulting work as a whole constitutes an original work of authorship. 17 U.S.C. §101.

20.The fact that component parts of a collective work are neither original to the author nor copyrightable by the author does not preclude a determination that the combination of such component parts as a separate entity is both original and copyrightable. *Apple Barrel Prods, Inc. v. R.D. Beard*, 730 F.2d 384, 388 (5th Cir. 1984).

21.A selection and arrangement of different programs into the "broadcast day" of a television station constitutes a copyrightable compilation that may be owned by the station regardless of the ownership of copyrights of individual programs. *Nat'l Assoc. of Broad v. Copyright Royalty Tribunal*, 675 F.2d 367, 377-78 (D.C. Cir. 1982).

22.Copyright protection may be allowed for compilations consisting largely of non-copyrightable elements. *Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 204-05 (9th Cir. 1989).

23. As long as a factual compilation features an original selection or arrangement of facts, even if the underlying facts are not copyrightable, the compilation may be entitled to copyright protection. *Situation Management Systems, Inc. v. ASP. Consulting Group,* 560 F.3d 53, 61 (1st Cir. 2009).

24. When an author makes creative choices in describing a process or system, itself not copyrightable under 17 U.S.C. § 102, those creative choices, "including the works' overall arrangement and structure," allow the work to satisfy the originality requirement for copyright protection. *Situation Management Systems, Inc. v. ASP. Consulting Group,* 560 F.3d 53, 61 (1st Cir. 2009).

25. "When a work displays a significant element of compilation, that element is [protectable] even though the individual components may not be, for originality may be found in taking the commonplace and making it into a new combination or arrangement." *United States v. Hamilton*, 583 F.2d 448, 451 (9th Cir. 1978).

26. Work which results from independent efforts of its author is copyrightable. *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1019 (9th Cir. 1989).

27. A compilation of works could qualify for protection even though its individual components were part of the public domain so long as original skill or labor was expended in creating the compilation. *Apple Barrel Prods, Inc. v. R.D. Beard*, 730 F.2d 384, 388 (5th Cir. 1984).

28. A protectable compilation requires "(1) the collection and assembly of pre-existing material, facts or data; (2) the selection, coordination or arrangement of those materials; and (3) the creation, by virtue of the particular selection, coordination, or arrangement, of an 'original' work of authorship." *Feist Publications, Inc. v. Rural Telephone Services, Co.*, 499 U.S. 340, 357 (1991).

29. "Originality" refers to the requirement that "the 'author' contributed something more than a 'merely trivial' variation, recognizably 'his own'." And, "[o]riginal, as the term is used in copyright, means only that the work was independently created by

the author (as opposed to copied from other works) and that it possesses at least some minimal degree of creativity." *Feist Publications, Inc. v. Rural Telephone Services, Co.*, 499 U.S. 340, 345 (1991).

30."[T]he requisite level of creativity is extremely low; even a slight amount will suffice." *Feist Publications, Inc. v. Rural Telephone Services, Co.*, 499 U.S. 340, 345 (1991).

31.The mere fact that Bikram used a matter in the public domain to create his Asana Sequence does not in and of itself preclude a finding of originality. *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1076 (9th Cir. 2000).

32.The Copyright Act recognizes protection for "pre-existing material, facts or data." *Feist Publications, Inc. v. Rural Telephone Services, Co.*, 499 U.S. 340, 357 (1991).

33.Courts routinely uphold copyright protection for works that compile public domain data. *See, e.g., CDN Inc. v. Kapes*, 197 F.3d 1256, 1260 (9th Cir. 1999) (coin price guide was sufficiently original and creative as a compilation to warrant copyright protection because prices were "compilations of data chosen and weighed with creativity and judgment"); *Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 204-05 (9th Cir. 1989) (organizers were copyrightable as compilations because a "copyrightable compilation can consist mainly or entirely of uncopyrightable elements"); *Urantia Foundation v. Maaherra*, 114 F.3d 955, 958-59 (9th Cir. 1997) (selection and arrangement of religious teachings believed to be of divine authorship were sufficiently creative to warrant copyright protection as a compilation); *United States v. Hamilton*, 583 F.2d 448, 450-51 (9th Cir. 1978) (map maker's selection, arrangement and presentation of terrain features which were already in the public domain was copyrightable as a compilation); *Kregos v. Associated Press*, 937 F.2d 700 (2nd Cir. 1991) (finding copyright protection for the format of a baseball form containing non-protectable pitching statistics); *Key Publications Inc. v. Chinatown Today Publishing Eners, Inc.*, 945 F.2d 509, 516

(2d Cir. 1991) (upholding copyright protection for a telephone book compiling, selecting and arranging names and telephone numbers).

34. The Copyright Act protects pantomimes, which is broadly defined to consist of "significant gesture without speech." *See* 17 U.S.C. § 102(a)(4).

35. In *Christensen*, the Supreme Court recognized an important limitation on the broad deference given by courts to agency regulations that was recognized in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). *Christensen v. Harris County*, 529 U.S. 576, 586-87 (2000).

36. "Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant Chevron-style deference." *Christensen v. Harris County*, 529 U.S. 576, 586-87 (2000).

37. Agency interpretations such as policy statements are "'entitled to respect' . . . but only to the extent that those interpretations have the 'power to persuade.'" *Christensen v. Harris County*, 529 U.S. 576, 586-87 (2000) (internal citations omitted).

38. "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

39. A court cannot make a determination that a copyright is not valid or is not infringed as a matter of law by granting a motion for summary judgment because such a determination requires a close factual analysis. *Feist Publications, Inc. v. Rural Telephone Services, Co.*, 499 U.S. 340, 357-58 (1991).

40. The trier of fact determines the originality of a work. *Swirsky v. Carey*, 376 F.3d 841, 844 (9th Cir. 2004).

41. The Copyright Office will only register works which, after examination, it determines are made up of copyrightable subject matter and will decline to register materials that it deems outside the scope of copyright protection. *See Marasclaco v. Fantasy, Inc.*, 953 F.2d 469, 473 (9th Cir. 1991).

DATED: November 19, 2012 Respectfully submitted,

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